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In The
Supreme Court of the United States

ALS SCAN, INCORPORATED,

Petitioner,

v.

DIGITAL SERVICE CONSULTANTS, INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition For Writ Of Certiorari

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QUESTION PRESENTED

Whether the Fourth Circuit's unique jurisdictional analysis, in which the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Internet, violates the traditional due process principles of personal jurisdiction.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Robert Wilkins and Alternative Products, Inc. were defendants in the proceedings before the United States District Court for the District of Maryland.

CORPORATE DISCLOSURE STATEMENT

ALS Scan, Inc. has no parent corporation and is not a publicly held corporation or affiliated with an entity that is so held.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ALS Scan, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Untied States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND ORDER BELOW

The opinion of the Untied States Court of Appeals for the Fourth Circuit (App. 1-19) is reported at 293 F.3d 707. The memorandum opinion and order of the district court (App. 20-35) is reported at 143 F. Supp. 2d 703.

JURISDICTION

The decision of the United States Court of Appeals was issued on June 14, 2002. This Petition for Writ of Certiorari is timely filed under Rule 13 of the Rules of the Supreme Court of the United States as it has been filed within ninety (90) days of the entry of the judgment by the Court of Appeals. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. V: No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ..

U.S. Const., Amend. XIV § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner ALS Scan, Inc. ("ALS") is a Maryland corporation with its place of business in Columbia, Maryland. ALS is engaged in the business of creating and marketing adult photographs that are distributed over the Internet. (App. 3).

Respondent Digital Service Consultants, Inc. ("Digital"), is an Internet Service Provider ("ISP") incorporated under the laws of the State of Georgia. Digital provided Internet access for two Web sites owned and operated by Robert Wilkins and Alternative Products, Inc. (collectively, "Alternative Products").[1] Alternative Products appropriated copies of hundreds of ALS's copyrighted photographs and placed them on its Web sites, thereby gaining revenue from them through membership fees and advertising. (App. 3).

Despite being under the threat of legal action by ALS for four months, Digital continued to provide Internet access to the Web sites knowing that they were violating ALS's copyrights.

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[1] Digital maintains its own Website at *http://www.dscga.com*. (App. 4).

Factual Statement.

ALS first learned that Digital was publishing ALS's copyrighted photographs on the two Web sites in October of 2000. A formal notice was sent to both Alternative Products and Digital in October of 2000, requesting that they cease and desist the copyright infringement on the two Alternative Products Web sites. Digital, responding to the cease and desist, admitted that it provided the "bandwidth"[2] for the Web sites but refused to take any action. (App. 37-38). On October 22, 2000, ALS warned Digital that continued violation of its copyrights would result in legal action. (App. 36). That warning was ignored.

Therefore, in January of 2001, one of the Alternative Products Web sites was accessed by an ALS's employee in Maryland, who purchased an "on-line" membership to the Web site using a credit card, and, by obtaining that membership, the employee received a "user name" and a "password" to access the Web site. (App. 5). On January 25, 2001, ALS again sent a cease and desist order to Digital that clearly showed the exact location of one of the infringed images. (App. 39).

On February 5, 2001, Digital finally responded to counsel for ALS and claimed that it had now "initiated steps to have Alt Prod cease the posting of [ALS] copyrighted material." (App. 42). It also, for the first time, assured ALS that it would "cut [Alternative Products'] bandwidth if they violate [Digital's] AUP

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[2] The Fourth Circuit's definition of bandwidth can be found at App. 3, n. 1.

[Acceptable Use Policy]." (App. 42). Additionally, Digital indicated that it "charged hourly" for its services to Alternative Products. (App. 43). Unfortunately, both Alternative Products Web sites continued to display, through Digital's system, ALS's copyrighted photographs in violation of the Copyright Act.

Procedural Statement.

On February 16, 2001, unable to obtain the cooperation of either Digital or Alternative Products, ALS brought an action under the Federal Copyright Act of 1976, as amended, *17 U.S.C. § § 101* et seq (the "Copyright Act"). (App. 21, 28 n.3.)

The complaint alleged that Alternative Products had appropriated copies of hundreds of ALS's copyrighted images and used those images to create their own Web site and gain membership and advertising revenue by displaying ALS's copyrighted photographs on its Web site. It was also alleged that Digital enabled the other two defendants to publish ALS's copyrighted photographs throughout the Internet.[3] (App. 30). Therefore, both Digital and Alternative Products knowingly had infringed and continued to infringe upon ALS's copyrights within

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[3] Contributory copyright infringement is found when a defendant, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Religious Tech. Ctr. v. Netcom On-Line Commun. Serv.*, 907 F. Supp. 1361, 1373 (N.D. Cal. 1995)(quoting *Gershwin Pub'g Corp. v. Columbia Artists Mgt.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

Maryland and elsewhere by selling, publishing and/or displaying ALS's copyrighted photographs on the Internet. (App. 3).

Digital filed a motion to dismiss the complaint against it pursuant to Federal Rule of Civil Procedure 12(b)(2), asserting that the district court lacked personal jurisdiction over it. (App. 4). Alternative Products never answered the complaint. (App. 28, n.3).

The district court denied ALS's request to conduct limited discovery on the subject of jurisdiction. Instead, it reviewed only the affidavits and exhibits submitted by the parties and concluded:

> that the facts pertaining to the jurisdictional issue before it have now been fully and fairly developed. Were the Court to permit plaintiff to conduct limited discovery, not only would the parties be undertaking discovery procedures but further briefing would also be necessary, and a decision on the pending motion would be delayed for many months. Defendant Digital is entitled to a prompt ruling on its motion, and the considerable delay sought by the plaintiff is not appropriate under the circumstances here.

(App. 28).

The district court then found that it had neither specific nor general jurisdiction over Digital because "Digital does not engage in any continuous and systematic activities within Maryland, and there is no evidence that [ALS's] claim arises out of any contacts which Digital may have with Maryland." (App. 5, 24).

From the district court's ruling dismissing Digital for lack of personal jurisdiction, ALS Scan filed an interlocutory appeal. (App. 5, 35).

The issue on appeal, as initially framed by the Fourth Circuit, was "whether a Georgia-based Internet Service Provider subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the Internet, in violation of a Maryland corporation's copyrights." (App. 2).

In Maryland, the exercise of personal jurisdiction is allowed to the extent permissible by the due process clause of the Fourteenth Amendment and, therefore, the inquiry was whether Digital had sufficient minimum contacts with Maryland. (App.6).

After initially laying out a three part test for specific jurisdiction (App. 9), the Fourth Circuit, believing that "the due process concepts of personal jurisdiction" needed to be "reconceived and rearticulated by the Supreme Court in light of technology advances," attempted to develop "the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually 'entered' the State via the Internet." (App. 12).

The Fourth Circuit "adopted" a model developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D. Pa 1997) that based personal jurisdiction on "the nature and quality of commercial activity that an entity conducts over the Internet." (App. 13). This led the court to determine that "Digital's activity was, at most, "passive and, therefore,

did not subject it to the jurisdiction of a Maryland court even though electronic signals from Digital's facility were concededly received in Maryland." (App. 15).

Accordingly, the Fourth Circuit affirmed the decision of the district court. (App. 3, 19).

REASONS FOR GRANTING THE PETITION

The Internet is now the fastest growing electronic technology in world history and its capacity to carry information doubles every 100 days.[4] At the end of the year 2001, there were more than 533 million Internet users worldwide, and 149 million of those users were located in the United States. It is projected that by the end of the year 2004, there will be approximately 945 million Internet users, and by the end of 2007, almost 1.5 billion people will regularly access the Internet. The United States will make up approximately 236 million of those users.[5]

With the increase in the number of people accessing the Internet on a regular basis has come a similar increase in litigation involving Internet issues. Because the Internet is a medium that, by its own nature, formulates human interaction, it is not surprising that the result of this behavior and collaboration has given

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[4] UCLA Center for Communication Policy, UCLA Internet Report: Surveying the Digital Future, 4, 5, 10 (2000).

[5] See Dr. Egil Juliussen, Computer Industry Almanac, *Internet Users Will Top 1 Billion in 2005; http://www.c-i-a.com/pr032102.htm* (accessed August 24, 2002).

rise to legal complications and questions which courts have yet to fully comprehend or answer. Chief among them is litigation related to personal jurisdiction.[6]

Despite the apparent importance of determining jurisdiction via the Internet, the basis for answering the question lies within the legal system's existing ability to comprehend modern technology and to formulate a rational due process test. Regrettably, courts have generally lagged behind technology and/or failed to understand its implications.[7] As a result, newly developed jurisdictional analysis is flawed.

The courts' ongoing struggle, in Internet-related cases, to determine when the exercise of personal jurisdiction is proper[8] has resulted in many different approaches and inconsistent outcomes leading one commentator to declare that "the current hodgepodge

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[6] George M. Perry, *Personal Jurisdiction in Cyberspace: Where Can You Be Sued, and Whose Laws Apply?*, 7 Media L. & Policy 1, 3 (1998).

[7] "Application of copyright law in cyberspace is elusive and perplexing. The world wide web has progressed far faster than the law and, as a result, courts are struggling, to catch up." *CoStar Group Inc. v. LoopNet Inc.*, 164 F. Supp. 2d 688, 693 (MD. 2001).

[8] "[A]ttempting to apply established trademark law in the fast - developing world of the internet is somewhat like trying to board a moving bus . . . ." *Millennium Enters., Inc., v. Millennium Music,* 33 F. Supp. 2d 907, 914 (D. Or. 1999) (relating the same difficulties to personal jurisdiction over the internet) (quoting *Bensusan Rest. Corp., v. King,* 126 F.3d 25, 27 (2d Cir. 1997)).

of case law is inconsistent, irrational, and irreconcilable."[9]

As the Internet continues to grow, the power of geographic sovereigns to regulate this boundary-defying medium will continue to be tested. In answering this test, courts must reject an approach that uses interactivity as a proxy for minimum contacts. Rather, courts can and should apply ordinary principles of real-space jurisdiction to "cyberspace."

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

"The dilemma [courts face] today is not much different than the dilemma courts faced 50 years ago when the application of a then rigid personal jurisdiction standard was at odds with what was then considered a recent trend in the way companies did business: interstate commerce." *Colt Studio, Inc. v. Badpuppy Enters.*, 75 F. Supp. 2d 1104, 1108 (C.D. Cal. 1999).

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[9] Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. Rev. 925, 939 (1998); see *also* Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 La. L. Rev. 565, 565 (1999) ("Predictable internet jurisdiction is becoming an oxymoron"); David Wille, *Personal Jurisdiction and the Internet: Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 Ky. L.J. 95, 110 (1999). ("Uncertainty reigns"); Michele N. Breen, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace into International Shoe*, 8 Seton Hall Const. L.J. 763, 791 (1998) (noting the judicial split in cases involving jurisdiction based solely on Internet contacts).

However, while recognizing that technological advances often alter societal and judicial norms, the existing precedent set by this Court satisfies all jurisdictional situations on the Internet,[10] including those situations involved in this case. If courts would focus their concentration on human volition, physical activity and location, instead of concentrating on the interpretation of computer activity on Web sites, they would surely render more consistent decisions.

A. The Governing Standards of In *Personam* Jurisdiction Have Been Established.

This Court has established a two-pronged test to determine whether personal jurisdiction may be properly exercised over a defendant.

First, due process requires that the defendant have certain minimum contacts with the forum so as not to "offend 'traditional notions of fair play and substantial justice.'" *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945)(quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The minimum contacts standard is satisfied where the defendant has "purposefully availed itself of the privilege of conducting activities

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[10] See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. Chi. Legal F. 207, 207-08 (1996) (arguing that traditional principles can be applied to the Internet, and that a "law of cyberspace" exists no more than a "law of the horse" exists); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 Int'l Law. 1167, 1167 (1998) (stating that "there is nothing about legal relations over computer networks that in any way challenges our conventional notions about how sovereign authority is allocated in the world").

within the forum state, thus evoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

The "Constitutional touchstone" of the minimum contacts analysis is "whether the defendant purposefully established" contacts with the forum state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) *(citing International Shoe Co. v. Washington,* 326 U.S. 310 (1945)). Defendants who "'reach out beyond one state' and create continuing relationships and obligations with the citizens of another state are subject to regulation and sanctions in the other State for consequences of their actions." *Id. (citing Travelers Health Assn. v. Virginia,* 339 U.S. 643, 647(1950)). "The foreseeability that is critical to the due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably expect to be haled into court there." *World Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980). This protects defendants from being forced to answer for their actions in a foreign jurisdiction based on "random, fortuitous or attenuated" contacts. *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774 (1984).

Second, due process mandates that "the relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.'" *Hanson,* 357 U.S. at 292 (citing *International Shoe,* 326 U.S. at 317). It is essential that in all cases, "the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that state." *Kulko*

v. Superior Court, 436 U.S. 84, 92 (1978). Thus, a limitation is imposed upon state-exercise of jurisdiction "in its role as a guarantor against inconvenient litigation. . . ." *World-Wide Volkswagen,* 444 U.S. at 292.

The "reasonableness" prong exists to protect defendants against unfairly inconvenient litigation. *World Wide Volkswagen,* 444 U.S. at 292. Under this prong, the exercise of jurisdiction will be reasonable if it does not offend "traditional notions of fair play and substantial justice." *International Shoe,* 326 U.S. at 316. When determining the reasonableness of a particular forum, the court must consider the burden on the defendant in light of other factors including:

> the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's right to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.

World Wide Volkswagen, 444 U.S. at 292 (internal citations omitted).

The Fourth Circuit acknowledged these principles as it prepared to consider:

> (1) the extent to which the defendant "purposefully availed" itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally "reasonable."

(App. 9). Unfortunately, it decided that "[a]pplying the traditional due process principles governing a State's jurisdiction over persons outside of the State based on Internet activity requires some adaptation of those principles because the Internet is omnipresent." (App. 10).

That "adaptation" went seriously awry when the court centered its attention on the "omnipresent" Internet instead of focusing on "the relationship among the defendant, the forum, and litigation . . . [which becomes] the central concern of the inquiry to personal jurisdiction." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

B. The Adaptation of Traditional Due Process to the Internet.

The Fourth Circuit, instead of focusing on Digital, Maryland and the copyright infringement, focused on Digital's Internet activity and, in so doing, circumvented the traditional due process analysis.

1. Old implements are not adjusted to new uses.[11]

While acknowledging the "limitations articulated in *International Shoe* and retained by *Hanson*," the Fourth Circuit observed that:

> the argument could still be made that the Internet's electronic signals are surrogates for the person and that Internet users conceptually enter a State to the extent that they send their electronic signals into the State, establishing those minimum contacts sufficient to subject the sending person to personal jurisdiction in the State where the signals are received.

(App. 11). Unfortunately, the court overlooked the "reasonableness" prong of the test and forebode that "if broad interpretation of minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated." (App. 11).

In reality, this fear is unfounded if a court conducts the proper due process analysis. The second prong prevents unfair assertions of personal jurisdiction even if an electronic contact is deemed constitutionally satisfactory. The factors to consider have been laid out in *World Wide Volkswagen,* (444 U.S. at 292) and rearticulated in *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113 (1987)(After consideration of those factors, the *Asahi* Court found jurisdiction over the

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[11] "If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow." Oliver Wendell Holmes, The Common Law (1881).

defendant unreasonable as a result of the burdens put on the defendant if litigation in the forum state continued).

The Fourth Circuit understood that the "convergence of commerce and technology . . . tends to push the analysis to include a "stream-of-commerce" concept, under which each person who puts an article into commerce is held to anticipate suit in any jurisdiction where the stream takes the article." However, observing that the "stream-of-commerce" concept had never been adopted by the Supreme Court, the court rejected the proposition and thereby, reached the end of its tether. (App. 12).

Unwilling, or unable, to plot a course with the "old implements" of traditional due process, the court choose to "develop . . . the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually "entered" the State via the Internet for jurisdictional purposes" until such time that "the due process concepts of personal jurisdiction are reconceived and rearticulated by the Supreme Court in light of advances in technology." (App. 12).

2. The Fourth Circuit "adopts" the *Zippo* Model.

In 1997, a Pennsylvania district court analyzed a Web site and suggested that whether a Web site accessible in the forum state conferred jurisdiction depended on "the nature and quality of commercial activity that an entity conducts over the Internet." *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) ("*Zippo*").

The district court then developed a "sliding scale" for defining when electronic contacts with a State are sufficient. By way of example, it identified three categories of Web sites.

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id.

Although the *Zippo* court divided its opinion into controlling pre-Internet and merely persuasive post-Internet jurisdictional precedent, the court proceeded to focus only on the latter in its holding, thus

catalyzing the confusion surrounding the ultimate approach to Internet activity. *See Zippo*, 952 F. Supp. at 1124.[12]

The district court (and the Fourth Circuit) failed to justify why interactivity should serve as a proxy for minimum contacts or why maintaining a highly interactive website should independently give rise to personal jurisdiction. *Id.* ("Our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet.") The court's basic assumption appears to be that the degree to which a Web site is interactive and commercial tracks the degree to which the website operators have availed themselves of the benefits of the forum district and can reasonably expect to be sued there. However, interactivity is a characteristic of the Web site itself; such an approach does not consider the specific forum to which the behavior is targeted. The degree of interactivity reveals nothing about whether the defendant has taken advantage of the benefits of a specific forum and can reasonably anticipate being subject to jurisdiction there.

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[12] See also Anindita Dutta, *Trademark: Personal Jurisdiction: Minimum Contacts: Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 13 Berkeley Tech. L.J. 289, 303 (1998) (noting that "it is understandable why the court's opinion in *Zippo* breeds only more confusion," and that "the problem is not only with how the court applies the traditional analysis of personal jurisdiction to the Internet, but also with how the court ignores the fact that Dot Com is a unique type of business").

Under the district court's test, a finding that a Web site is highly interactive suggests that a website operator may be subjected to a lawsuit in every forum in the country, but has little to do with a defendant's contact with a specific forum. On the other hand, the specific nature of on-line copyright infringement, that is, simple images on a Web site or Web page, remains a tort that easily escapes commercially based contacts as well as the necessity of a defendant's physical presence in the forum state at any time prior or subsequent to its posting. The passivity of a suspect Web site would eliminate it from a foreign court's jurisdiction under *Zippo* principles; however, using traditional contacts and concepts, a defendant may be brought to justice, regardless of the categorization of the Web site. [13]

This scenario was articulated in *Oasis Corp. v. Judd*, 132 F. Supp. 2d 612 (S.D. 2001), when the court, recognizing that the "vast majority of the 'Internet jurisdiction' case law at this time . . . addresses the jurisdictional question in the context of *commercial* Web sites," determined that "when, as here, the site in question is non-commercial in nature, the *Zippo* analysis which seems to be gaining favor in the courts of appeal offers little to supplement the traditional framework for considering questions of personal jurisdiction." *Id.* at 622 n.9; *see also Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999).

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[13] Leitstein, at 578 *supra* note 9 (stating that the "doing business" prong of the *Zippo* sliding scale test "is the least helpful").

Further confusing the analysis is that all Web sites are, to some degree, interactive. At a basic level, Web sites are never really passive because there is a continuous transmission of information passed between the user and the site operator that occurs with every "hit" on a Web site, regardless of whether the hit results in a transaction.[14]

Zippo also suggests that a "repeated transmission of computer files over the Internet" bestows the status of "clearly [doing] business over the Internet." The *Zippo* court geared this prong toward commercial activity; however, those engaging in commercial activity are becoming so numerous as to render the label worthless. *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1239 (N.D. Ill. 1996) (stating that "because Internet communications transmit instantaneously on a worldwide basis there is little question that the 'in commerce' requirement would be met in a typical Internet message, be it trademark infringement or false advertising").

The Fourth Circuit never explained or even acknowledged the fact that the *Zippo* court analyzed a Web site while it was analyzing an Internet Service Provider. Nonetheless, the court, without explanation or justification, first adapts the *Zippo* model to accommodate an ISP, then adapts that mutation to a traditional due process analysis to form the following:

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[14] *Id.* at 582.

> Thus, adopting and adapting the *Zippo* model, we conclude that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.
>
> (App. 12). Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

(App. 14).

Although the Fourth Circuit claimed that "[t]his standard for reconciling contacts through electronic media with standard due process principles is not dissimilar to that applied by the Supreme Court in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984)," it is plain that the court applied a *Zippo* "sliding scale" test when it summarily concluded that "Digital's activity was, at most, passive." (App. 15). For had the court followed *Calder*, it would have focused its analysis on the actual effects in Maryland

instead of focusing, as it did, on the technology used. *See e.g. Panavision International, L.P. v. Toeppen,* 141 F.3d 1316, 1318 (9th Cir. 1998).

Interactivity should not be a factor for the courts to consider in personal jurisdiction cases. The focus of online personal jurisdiction issues should not be on the medium on which activities are conducted but rather it should be, as this Court has instructed, on the conduct of the parties.

C. The Fourth Circuit Analysis.

This Court has previously recognized that the "minimum contacts" test "is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine" the existence of jurisdiction. In this determination, "few answers will be written 'in black and white.' The greys are dominant and even among them the shades are innumerable." *Kulko,* 436 U.S. at 92.

The district court's had not allowed limited discovery on the issue of jurisdiction, (App. 19 n. 3), thereby handing the appellate court a dearth of facts to weight. As a result, the Fourth Circuit's analysis was a mere conclusory paragraph:

> Applying this standard to the present case, we conclude that Digital's activity was, at most, passive and therefore does not subject it to the judicial power of a Maryland court even though electronic signals from Digital's facility were concededly received in Maryland. Digital functioned from Georgia as an ISP, and in that

> role provided bandwidth to Alternative Products, also located in Georgia, to enable Alternative Products to create a website and send information over the Internet. It did not select or knowingly transmit infringing photographs specifically to Maryland with the intent of engaging in business or any other transaction in Maryland. Rather, its role as an ISP was at most passive. Surely, it cannot be said that Digital "purposefully availed" itself of the privilege of conducting business or other transactions in Maryland.

(App. 12). The court offered no details about, or analysis of, Digital's Internet activity. Once the court summarily labeled the activity as "passive," the analysis was, for all practical purposes, over. Clearly, the court's lack of discussion reveals a discomfort with on-line contacts as a basis for jurisdiction.

Completely absent in the Fourth Circuit's analysis was whether Digital should have reasonably expected to be haled into court in Maryland or whether Digital's actions were "random, fortuitous or attenuated." Nor was there a discussion of the four month period from October 2000 to February 2001, where Digital had **actual knowledge** that it was sending ALS's copyrighted photographs into Maryland and was injuring ALS, a Maryland corporation. Therefore, the transmitting of ALS's copyrighted photographs after

October 2000 into Maryland and elsewhere was a known, continuing, repetitive event, not an isolated occurrence.[15]

The Fourth Circuit's opinion ignores the reality of the modern World Wide Web. The copyrighted photographs did not get to Maryland by "chance" or "fortuitous circumstances." But for Digital's actions, those copyrighted photographs would not have left the server on which they resided. Rather than ceasing its display of the Web site, Digital continued to profit by providing bandwidth to a Web site it **knew** was violating ALS's copyrights. As an Internet Service Provider, the very existence of Digital's business depends on its ability to provide its customers access worldwide. Not only does Digital clearly do business over the Internet, its business is to repeatedly transmit computer files over the Internet. Digital cannot be allowed to avoid responsibility for harm it caused merely because its Internet activity is termed "passive." To authorize such a shield would be to allow Digital to benefit economically from the Internet without any burden of responsibility for its torts. This practice virtually shields Digital from liability torts caused by its transmissions, though it is able to knowingly reap the economic benefits from the forum.

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[15] The court mentioned it in passing. (App. 16).

> none of its conduct in enabling a website created a cause of action in Maryland, although on this last point, facts would have to be developed about whether Digital continued to enable the website after receiving notice. . . . This factual issue, however, need not be resolved because Digital's conduct does not satisfy the first two prongs of the test.

This Fourth Circuit's standard obfuscates the minimum contacts issue and under its reasoning, an ISP can place copyrighted material on the Internet with the knowledge, or perhaps specific intent, that anyone in the world that is connected to the Internet may access the material and nevertheless be insulated from the jurisdiction of almost all of the courts where the material is located. At the same time, the ISP uses the Internet as a commercial vehicle to provide its clients the ability to reach the whole world. The incongruity lies in the fact that by achieving its purpose of mass exposure, the ISP becomes immune from the jurisdiction of all state courts except where it can physically be found.

D. Other Circuits Adhere to the Traditional Analysis.

Fortunately, not all courts are swayed by new technology and have remained firmly anchored to the concept of traditional due process as they drift into the age of the Internet. *See, e.g., Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 553 (N.J. 2000) (stating that "rather than to attempt to create a new order of jurisdictional analysis adapted to the Internet, we prefer in this case to adhere to the basics").

1. The Tenth Circuit.

The Tenth Circuit had an opportunity to decide a remarkably similar personal jurisdiction case that involved an ISP transmitting e-mail into Oklahoma. The court analyzed the case using traditional due process principles without even considering adapting them for the Internet or adopting the *Zippo* model.

In *Intercon, Inc. v. Bell Atlantic Internet Solutions*, 205 F.3d 1244 (10th Cir. 2000), the United States Court of Appeals for the Tenth Circuit reversed the district court and found jurisdiction over a nonresident Internet company, Bell Atlantic Internet Solutions ("Bell Atlantic"). Intercon, an Oklahoma corporation, was an ISP whose domain name was "icon.net." Bell Atlantic, a Delaware corporation doing business in the Northeast and Mid-Atlantic states, also offered Internet access to its customers, providing that service through various global service providers, including a New Jersey company named ICon CMT, which used the domain name "iconnet.net." A routing error occurred, causing Bell Atlantic to route its customers' e-mails through Intercon's server instead of its own. Intercon called Bell Atlantic on several occasions to address the situation, and Bell Atlantic took steps to remedy the problem, which it finally resolved some four months later by "completely blocking customer access to [Intercon's] mail server."

The Court of Appeals found that:

> although [Bell Atlantic] may have had a legitimate business reason for not terminating its use of the Oklahoma mail server immediately--concerns over interrupting its customers' service--this does not negate the fact that [Bell Atlantic] purposefully availed itself of the Oklahoma server for almost four months after being notified of the erroneous address.

Id. at 1248.

The court rejected Bell Atlantic's arguments that its inadvertent contacts with Oklahoma were merely "fortuitous," finding instead that Bell Atlantic's continued use of Intercon's server after receiving notice of the misrouting problem was both "knowing and intentional." "After receiving notice of the routing error, defendant knew its conduct over the next four months was causing injury in Oklahoma, and it should reasonably have expected to be sued there." Therefore, jurisdiction in Oklahoma was deemed proper. *Id.*

The court also weighed the other factors discussed in *Burger King* (the burden on the defendant, the interest of the forum state in resolving the dispute, the plaintiffs interest in obtaining effective relief, the interstate judicial system's interest in resolving disputes, and the shared interest of the several states in furthering substantive social policies), and concluded that the exercise of jurisdiction was reasonable. *Id.* at 1249.

2. The D.C. Circuit specifically rejects *Zippo*.

In *GTE New Media Services, Inc. v.. BellSouth Corp,* 199 F.3d 1343 (D.C. Cir. 2000), the D.C. Circuit considered an antitrust case in which GTE New Media Services ("GTE") contended that BellSouth Corp. and other companies were engaged in a conspiracy to dominate the Internet directories market in the Washington, D.C., metropolitan area by diverting Internet users from GTE's Web site to the defendants' Web sites instead. The court of appeals held that, because BellSouth's only proven contacts with the District of Columbia were based on the fact that its residents could access defendants' Internet Yellow

Pages from within the city, there were insufficient minimum contacts to allow an exercise of personal jurisdiction. *Id.* at 1350. Although "mere accessibility" of a Web site was not found sufficient, the appellate court did rule that GTE could conduct additional discovery in order to seek proof of sufficient contacts.

The district court had used the *Zippo* "sliding scale" approach and found that the defendants' Web sites fell into the uncertain middle ground and granted jurisdiction based on the highly interactive nature and commercial quality of the Web sites.

The D.C. Circuit's focus was on the defendants' activities and specifically whether they had caused harm within the forum as a result of those activities. The D.C. Circuit disapproved of treating a case involving the Internet any differently from any other jurisdictional case, saying: "We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction." *Id.*

Significantly, although the D.C. Circuit found that the plaintiff had failed to establish sufficient contacts to support an exercise of personal jurisdiction, it held that plaintiff was entitled to conduct "jurisdictional discovery" in order to supplement the record.

The D.C. Circuit's approach appropriately focuses on the traditional purposeful availment standard and asks whether defendants have targeted their behavior toward a specific forum. The circuit court reached the correct result by an approach that provides better

notice to potential defendants regarding when their Internet contacts with a particular forum will subject them to suit.

CONCLUSION

The Internet does not exist in a vacuum, but exists as a product of human volition. The courts should treat it as such. The Internet provides new technology, but does not provide novel legal questions. The spirit of personal jurisdiction, although technically altered as a result of Internet distribution, retains the same basic tenets as in the pre-Internet era. As such, jurisdictional tests should remain in tact. As jurisdictional tests are "adjusted" for applicability to the Internet, this Court must guard the underlying constitutional principles of personal jurisdiction. Therefore, this petition for writ of certiorari should be granted.

Respectfully Submitted,

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Dated: September 11, 2002

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ALS SCAN, INCORPORATED, Plaintiff-Appellant,

v.

DIGITAL SERVICE CONSULTANTS, INCORPORATED, Defendant-Appellee,

and

ROBERT WILKINS;

ALTERNATIVE PRODUCTS, INCORPORATED, d/b/a abpefarc.net, individually, Defendants.

No. 01-1812

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

293 F.3d 707; 2002 U.S. App. LEXIS 11745; 63 U.S.P.Q.2D (BNA) 1389

April 4, 2002, Argued
June 14, 2002, Decided
[June 14, 2002, Entered]

PRIOR HISTORY:

[**1] Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey II, Senior District Judge. (CA-01-496-H). *ALS Scan, Inc. v. Wilkins, 142 F. Supp. 2d 703, 2001 U.S. Dist. LEXIS 6605 (D. Md. 2001).*

DISPOSITION:
Affirmed.

COUNSEL:
ARGUED: Robert Lawrence Lombardo, Jr., Columbia, Maryland, for Appellant.

Benjamin I. Fink, FREED & BERMAN, P.C., Atlanta, Georgia, for Appellee.

ON BRIEF: Linda Woolf, GOODELL, DEVRIES, LEECH & GRAY, L.L.P., Baltimore, Maryland, for Appellee.

JUDGES:
Before NIEMEYER, Circuit Judge, HAMILTON, Senior Circuit Judge, and W. Craig BROADWATER, United States District Judge for the Northern District of West Virginia, sitting by designation. Judge Niemeyer wrote the opinion, in which Senior Judge Hamilton and Judge Broadwater joined.

OPINION BY:
NIEMEYER

OPINION:
[*709] NIEMEYER, Circuit Judge:

The question presented in this appeal is whether a Georgia-based Internet Service Provider subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the Internet, in violation of a Maryland corporation's copyrights. Adapting the traditional due process principles used to determine a State's authority to exercise personal jurisdiction over out-of-state persons to the Internet context, we hold that **[**2]** in the circumstances of this case, a Maryland court cannot constitutionally exercise

jurisdiction over the Georgia Internet Service Provider. Accordingly, we affirm the district court's order dismissing the complaint against the Internet Service Provider for lack of personal jurisdiction.

I

ALS Scan, Inc., a Maryland corporation with its place of business in Columbia, Maryland, commenced this action for copyright infringement against Digital Service Consultants, Inc. ("Digital"), and Digital's customers, Robert Wilkins and Alternative Products, Inc. (collectively, "Alternative Products"). ALS Scan, which creates and markets adult photographs of female models for distribution over the Internet, claims that Alternative Products appropriated copies of hundreds of ALS Scan's copyrighted photographs and placed them on its websites, *www.abpefarc.net* and *www.abpeuarc.com*, thereby gaining revenue from them through membership fees and advertising. ALS Scan further alleges that Digital, as the Internet Service Provider ("ISP") for Alternative Products, "enabled" Alternative Products to publish ALS Scan's copyrighted photographs on the Internet by providing Alternative Products with **[**3]** the bandwidth service[1] needed to maintain its websites. ALS Scan thus alleges that all of the defendants have infringed and are

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[1] Bandwidth in this context has been explained by the following analogy: "If you think of the Internet as the Information Superhighway, then think of bandwidth as how many lanes of traffic it can handle. Bandwidth describes how much information can be sent over a connection at one time." *See Glossary of Internet Terms: Bandwidth*, Internet for Beginners, *at* http://netforbeginners.about.com/library/glossary/ bldef-bandwidth.htm (last visited May 18, 2002).

infringing its copyrights within Maryland and elsewhere by selling, publishing, and displaying its copyrighted photographs.

Digital filed a motion to dismiss the complaint against it under Federal Rule of Civil Procedure 12(b)(2), asserting that the district court lacked personal jurisdiction over it. In support of its motion, Digital provided affidavits demonstrating that Digital is a Georgia corporation with its only place **[**4]** of business in Atlanta. Digital asserts that it is an ISP which provided bandwidth service to Alternative Products as a customer but that it is not affiliated in any way with Alternative Products except through an arms-length customer relationship. In addition, Digital states that it did not select the infringing photographs for publication; it did not have knowledge that they were posted on Alternative Products' website; and it received no income from Alternative Products' subscribers. Digital acknowledges that it does maintain its own website, *www.dscga.com*, but asserts that its website "contains no means for any person to enter into a contract with, transfer funds to, or otherwise transact business with, Digital."

Digital also states that, other than through the Internet, it has no contacts with the State of Maryland. It avers that it conducts no business and has no offices in Maryland; that it has no contracts with any persons or entities in Maryland; that **[*710]** it derives no income from any clients or business in Maryland; that it does not advertise in Maryland (other than through its website); and that it owns no property in Maryland.

In a responding affidavit, ALS Scan asserts [**5] that copies of its copyrighted photographs have appeared on Alternative Products' two websites, *www.abpefarc.net* and *www.abpeuarc.com*. It also alleges that one of its employees in Maryland purchased an "on-line" membership to *www.abpefarc.net*, using a credit card, and, by obtaining that membership, the employee received a "user name" and a "password" to access the website. That website, it asserts, displayed ALS Scan's copyrighted photographs, allegedly in violation of the Copyright Act.

The district court granted Digital's motion to dismiss for lack of personal jurisdiction. The court found that it had neither specific nor general jurisdiction over Digital because "Digital does not engage in any continuous and systematic activities within Maryland, and there is no evidence that [ALS Scan's] claim arises out of any contacts which Digital may have with Maryland."

From the district court's ruling, ALS Scan filed this interlocutory appeal.[2]

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[2] ALS Scan asserts that the district court certified its right to file an interlocutory appeal in accordance with Federal Rule of Civil Procedure 54(b), an assertion that Digital now disputes. Following oral argument, ALS Scan provided the court with a copy of the district court's June 19, 2001 order, directing that this interlocutory appeal be "transmitted to the United States Court of Appeals for the 4th Circuit." We accept this order as fulfilling the requirements of Rule 54(b).

II

The district court's decision to dismiss the complaint against Digital for lack of personal jurisdiction presents a legal question that we review *de novo, see Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Nolan, 259 F.3d 209, 215 (4th Cir. 2001),* although we review any underlying factual findings for clear error, *see In re Celotex Corp., 124 F.3d 619, 627 (4th Cir. 1997).*

Under Federal Rule of Civil Procedure 4(k)(1)(A), a federal court may exercise personal jurisdiction over a defendant in the manner provided by state law. *See ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 622 (4th Cir. 1997).* Maryland courts have concluded that the State's long-arm statute, Md. Code Ann., Courts & Jud. Proc. § 6-103, expands Maryland's exercise of personal jurisdiction to the extent allowed by the Due Process Clause of the Fourteenth Amendment. *See Androutsos v. Fairfax Hosp., 323 Md. 634, 594 A.2d 574, 576 (Md. 1991).* "Because the limits of Maryland's statutory authorization for the exercise of personal jurisdiction are coterminous with the limits of the Due Process Clause, the statutory [**7] inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one." *Stover v. O'Connell Assocs., Inc., 84 F.3d 132, 135-36 (4th Cir. 1996).* Thus, we apply the constitutional limitations on state service of process incorporated in Rule 4(k)(1)(A), and our inquiry coalesces into the question of whether Digital has sufficient minimum contacts with Maryland. *See Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners, 229 F.3d 448, 450 (4th Cir. 2000); Ciena Corp. v. Jarrard, 203 F.3d 312, 317 (4th Cir. 2000).*

Historically, the limits on personal jurisdiction were grounded in a court's power over the actual person of the defendant. Thus, a person's "presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally **[*711]** binding him." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)* (citing *Pennoyer v. Neff, 95 U.S. 714, 733, 24 L. Ed. 565 (1877)*). Over time, however, and with the introduction of personal service of summons or other forms of notice, the Supreme Court recognized **[**8]** that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe, 326 U.S. at 316* (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)*). With respect to corporations, the Court has recognized that "unlike an individual, its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Id.* Thus, "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *Id. 326 U.S. at 316-17.*

Although the courts have recognized that the standards used to determine the proper exercise of personal jurisdiction may evolve as technological progress occurs, it nonetheless has remained clear that technology cannot eviscerate the constitutional **[**9]** limits on a State's power to exercise jurisdiction over a

defendant. In *Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958),* the Court explored the problem of reconciling technological advances with the limits of personal jurisdiction and stated:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. State of Washington.* But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a **[**10]** defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Id. at 250-51 (internal citations omitted); *see also McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957)* (noting that the trend toward expanding the permissible scope of personal jurisdiction is, in part, "attributable to the fundamental transformation of our national economy over the

years"). The Court has thus mandated that limits on the states' power to exercise personal jurisdiction over nonresidents must be maintained, despite the growing ease with which business is conducted across state lines.

Determining the extent of a State's judicial power over persons outside of its borders under the *International Shoe* standard can be undertaken through two different approaches -- by finding specific jurisdiction based on conduct connected to the suit or by finding general jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct.* **[*712]** *1868 (1984); Christian Science Bd., 259 F.3d at 216.* **[**11]** If the defendant's contacts with the State are also the basis for the suit, those contacts may establish specific jurisdiction. In determining specific jurisdiction, we consider (1) the extent to which the defendant "purposefully availed" itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally "reasonable." *See Christian Science Bd., 259 F.3d at 216; see also Helicopteros, 466 U.S. at 414 & n.8* (describing a basis for jurisdiction where "a controversy is related to or 'arises out of' a defendant's contacts with the forum").

On the other hand, if the defendant's contacts with the State are not also the basis for suit, then jurisdiction over the defendant must arise from the defendant's general, more persistent, but unrelated contacts with the State. To establish general jurisdiction over the defendant, the defendant's activities in the State must

have been "continuous and systematic," a more demanding standard than is necessary for establishing specific jurisdiction. *See Helicopteros, 466 U.S. at 414 & n.9;* **[**12]** *ESAB Group, 126 F.3d at 623.*

III

In this case, ALS Scan argues that Digital's activity in enabling Alternative Products' publication of the infringing photographs on the Internet, thereby causing ALS Scan injury in Maryland, forms a proper basis for the district court's specific jurisdiction over Digital. The question thus becomes whether a person electronically transmitting or enabling the transmission of information via the Internet to Maryland, causing injury there, subjects the person to the jurisdiction of a court in Maryland, a question of first impression in the Fourth Circuit.

Applying the traditional due process principles governing a State's jurisdiction over persons outside of the State based on Internet activity requires some adaptation of those principles because the Internet is omnipresent -- when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, **[**13]** in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.

But under current Supreme Court jurisprudence, despite advances in technology, State judicial power over persons appears to remain limited to persons within the State's boundaries and to those persons outside of the State who have minimum contacts with the State such that the State's exercise of judicial power over the person would not offend traditional notions of fair play and substantial justice. *See Hanson, 357 U.S. at 250-51* (noting that "it is a mistake to assume that [the technological] trend heralds the demise of all restrictions"). But even under the limitations articulated in *International Shoe* and retained by *Hanson*, the argument could still be made that the Internet's electronic signals are surrogates for the person and that Internet users conceptually enter a State to the extent that they send their electronic signals into the State, establishing those minimum contacts sufficient to subject the sending person to personal jurisdiction in the State where **[**14]** the **[*713]** signals are received. Under this argument, the electronic transmissions "symbolize those activities ... within the state which courts will deem to be sufficient to satisfy the demands of due process." *Int'l Shoe, 326 U.S. at 316-17.* But if that broad interpretation of minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.

In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet. That thought certainly would have been considered

outrageous in the past when interconnections were made only by telephones. *See, e.g., Stover, 84 F.3d at 137* (finding a defendant's "occasional telephonic requests for information from Maryland-based investigation services" to be insufficient to subject the defendant to personal jurisdiction in a Maryland court). But now, even though the medium is still **[**15]** often a telephone wire, the breadth and frequency of electronic contacts through computers has resulted in billions of interstate connections and millions of interstate transactions entered into solely through the vehicle of the Internet. The convergence of commerce and technology thus tends to push the analysis to include a "stream-of-commerce" concept, under which each person who puts an article into commerce is held to anticipate suit in any jurisdiction where the stream takes the article. But the "stream-of-commerce" concept, although considered, has never been adopted by the Supreme Court as the controlling principle for defining the reach of a State's judicial power. *See generally Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987).*

Until the due process concepts of personal jurisdiction are reconceived and rearticulated by the Supreme Court in light of advances in technology, we must develop, under existing principles, the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually "entered" the State via the Internet for jurisdictional purposes. **[**16]** Such principles are necessary to recognize that a State does have limited judicial authority over out-of-state persons who use the Internet to contact persons within the State. Drawing on the requirements for establishing specific

jurisdiction, *see Helicopteros, 466 U.S. at 414 & n.8,* which requires *purposeful* conduct directed at the State and that the plaintiff's claims arise from the purposeful conduct, we adopt today the model developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).*

In *Zippo,* the court concluded that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *952 F. Supp. at 1124.* Recognizing a "sliding scale" for defining when electronic contacts with a State are sufficient, the court elaborated:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of **[**17]** computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet **[*714]** Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. (internal citations omitted); *accord Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999)* (citing the *Zippo* standard for "passive" Web sites and thus finding a corporation's Web site an insufficient basis for an exercise of personal jurisdiction); *Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999)* (applying *Zippo*'s sliding scale test to the case before it); *Cybersell, Inc. v. Cybersell, Inc, 130 F.3d 414, 418 (9th Cir. 1997)* **[**18]** (quoting *Zippo* for the proposition that "courts that have addressed interactive sites have looked to the 'level of interactivity and commercial nature of the exchange of information that occurs on the Web site' to determine if sufficient contacts exist to warrant the exercise of jurisdiction").

Thus, adopting and adapting the *Zippo* model, we conclude that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action **[**19]** cognizable in courts located in the State.

This standard for reconciling contacts through electronic media with standard due process principles is not dissimilar to that applied by the Supreme Court in *Calder v. Jones, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984).* In *Calder,* the Court held that a California court could constitutionally exercise personal jurisdiction over a Florida citizen whose only material contact with California was to write a libelous story in Florida, directed at a California citizen, for a publication circulated in California, knowing that the "injury would be felt by [the Californian] in the State in which she lives and works." *Id. at 789-90.* Analogously, under the standard we adopt and apply today, specific jurisdiction in the Internet context may be based only on an out-of-state person's Internet activity directed at Maryland and causing injury that gives rise to a potential claim cognizable in Maryland.

Applying this standard to the present case, we conclude that Digital's activity was, at most, passive and therefore does not subject it to the judicial power of a Maryland court even though electronic signals **[**20]** from Digital's facility were concededly received in Maryland. Digital functioned from Georgia as an ISP, and in that role provided bandwidth to Alternative Products, also located in Georgia, to enable Alternative Products to create a website and send information over the Internet. It did not select or knowingly transmit infringing photographs specifically to Maryland **[*715]** with the intent of engaging in business or any other transaction in Maryland. Rather, its role as an ISP was at most passive. Surely, it cannot be said that Digital

"purposefully availed" itself of the privilege of conducting business or other transactions in Maryland. *See ESAB Group, 126 F.3d at 623* (quoting *Hanson, 357 U.S. at 253).*

Indeed, the only *direct* contact that Digital had with Maryland was through the general publication of its website on the Internet. But that website is unrelated to ALS Scan's claim in this case because Digital's website was not involved in the publication of any infringing photographs. *See Christian Science Bd., 259 F.3d at 216.*

Thus, under the standard articulated in this case, Digital did not direct its electronic activity specifically **[**21]** at any target in Maryland; it did not manifest an intent to engage in a business or some other interaction in Maryland; and none of its conduct in enabling a website created a cause of action in Maryland, although on this last point, facts would have to be developed about whether Digital continued to enable the website after receiving notice. *See ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 620 (4th Cir. 2001).* This factual issue, however, need not be resolved because Digital's conduct does not satisfy the first two prongs of the test.

Accordingly, we agree with the district court that Digital's contacts in Maryland do not justify a Maryland court's exercise of specific jurisdiction over Digital.

IV

It is not clear whether ALS Scan contends that, even if it is unable to establish specific jurisdiction over Digital, a Maryland court should nevertheless assert *general* jurisdiction over Digital. At one point in its brief, ALS Scan acknowledged that Digital's contacts with Maryland are "perhaps not extensive enough" to justify a finding of general jurisdiction. But, somewhat in tension with this acknowledgment, ALS Scan continues to argue that Digital's **[**22]** general contacts with Maryland through the maintenance of its own website are sufficient to justify the district court's exercise of general jurisdiction over Digital.

It is true that even in the absence of specific jurisdiction, general jurisdiction may exist when the defendant has sufficient contacts with the forum State. *See Helicopteros, 466 U.S. at 414 & n.9.* General jurisdiction may be asserted over a defendant "whose activities in the forum state have been continuous and systematic .... But the threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction." *ESAB Group, 126 F.3d at 623* (internal quotation marks and citation omitted).

We are not prepared at this time to recognize that a State may obtain general jurisdiction over out-of-state persons who regularly and systematically transmit electronic signals into the State via the Internet based solely on those transmissions. Something more would have to be demonstrated. And we need not decide today what that "something more" is because ALS Scan has shown no more.

Other than maintain its website on the Internet, Digital **[**23]** has engaged in no activity in Maryland, and its only contacts with the State occur when persons in Maryland access Digital's website. Even though electronic transmissions from maintenance of a website on the Internet may have resulted in numerous and repeated electronic connections with persons in Maryland, such transmissions do not add up to the quality of contacts necessary for a State to have jurisdiction over the person for all purposes. *See GTE New Media Servs., Inc. v. BellSouth Corp., 339 U.S. App. D.C. 332, 199 F.3d 1343, 1349 (D.C. Cir. 2000)* (finding that "personal jurisdiction surely cannot be based solely on **[*716]** the ability of District [of Columbia] residents to access the defendants' websites, for this does not by itself show any persistent course of conduct by the defendants in the District"); *Mink, 190 F.3d at 336* (finding AAAA's website to be "insufficient to subject it to personal jurisdiction" because AAAA merely posted information about its products, provided users with a printable mail-in order form, and provided contact information for the company, including an e-mail address).

V

For the foregoing reasons, we affirm the order **[**24]** of the district court dismissing the complaint against Digital for lack of personal jurisdiction.[3]

AFFIRMED

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[3] ALS Scan also challenges the district court's refusal to have allowed it to engage in discovery before ruling on the jurisdictional issue. ALS Scan has failed, however, to proffer any further facts that it could demonstrate that would be material to the limited jurisdictional ruling. The district court already had ALS Scan's affidavit as well as the product of its Internet searches. Moreover, ALS Scan has not suggested that the jurisdictional facts asserted by Digital in its affidavits are inaccurate. At most, it made some conclusory allegations in support of its request for discovery. In these circumstances, we conclude that the district court did not abuse its discretion and was justified in concluding that further discovery would not aid resolution of the personal jurisdiction issue. *See Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 64 (4th Cir. 1993).*

ALS SCAN, INC., Plaintiff vs. ROBERT WILKINS, ALTERNATIVE PRODUCTS, INC. and DIGITAL SERVICE CONSULTANTS, INC., Defendants
CIVIL NO. H-01-496

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

142 F. Supp. 2d 703; 2001 U.S. Dist. LEXIS 6605; Copy. L. Rep. (CCH) P28,273

May 18, 2001, Decided
[May 18, 2001, Entered]

DISPOSITION:
[**1] Motion to dismiss for lack of personal jurisdiction of defendant Digital Service Consultants, Inc. granted; and defendant Digital Service Consultants, Inc. dismissed.

COUNSEL:
For ALS SCAN, INC., plaintiff: Robert L Lombardo, Law Office, Columbia, MD USA.

For DIGITAL SERVICE CONSULTANTS, INC., defendant: Linda S Woolf, Goodell DeVries Leech and Dann LLP, Baltimore, MD USA.

For DIGITAL SERVICE CONSULTANTS, INC., defendant: Andrea Muller, Benjamin I Fink, Freed and Berman PC, Atlanta, GA USA.

JUDGES:
Alexander Harvey, II, Senior United States District Judge.

OPINIONBY:
Alexander Harvey, II

OPINION:
[*704]

MEMORANDUM AND ORDER

This civil action has been brought under the Federal Copyright Act of 1976, as amended, *17 U.S.C. § § 101* et seq (the "Copyright Act"). Plaintiff ALS Scan, Inc. ("ALS Scan") is engaged in the **[*705]** business of creating and marketing adult photographs for the Internet. Named as defendants are Robert Wilkins ("Wilkins"), Alternative Products, Inc. ("Alternative Products") and Digital Service Consultants, Inc. ("Digital").

It is alleged in the complaint that defendants have infringed plaintiff's copyrights by publishing plaintiff's copyrighted photographic **[**2]** images on the Internet and by offering them for sale in Maryland via the Internet through memberships to defendants' website. Plaintiff seeks statutory damages and other relief under the Copyright Act.

Presently pending before the Court is a motion to dismiss the complaint filed by defendant Digital. In support of that motion, defendant Digital contends that it does not have sufficient contacts with the State of Maryland to provide this Court with personal jurisdiction over it. Memoranda and exhibits in support of and in opposition to this motion have been filed by plaintiff and by defendant Digital.

Following its review of the pleadings, memoranda and exhibits, this Court has concluded that no hearing is necessary for a decision on the pending motion. See Local Rule 105.6. For the reasons stated herein, the motion to dismiss of defendant Digital will be granted.

I

Background Facts

As alleged in the complaint, the facts are as follows. Plaintiff ALS Scan is a Maryland corporation with an office in Columbia, Maryland. Defendant Digital is incorporated under the laws of the State of Georgia and has its only place of business in that State. ALS Scan is engaged in the business [**3] of creating and marketing adult photographs for the Internet, including original pictures of female models. Plaintiff's products are marketed throughout the United States. All of its photographs are copyrighted and contain the name "ALS Scan" as well as a copyright symbol.

Defendants Wilkins and Alternative Products have created a website on the Internet with the domain name "abpefarc.net." Defendant Digital is an Internet service provider, and its services enable defendants Wilkins and Alternative Products to publish plaintiff's copyrighted photographs throughout the Internet.

According to the complaint, defendants Wilkins and Alternative Products have appropriated copies of hundreds of plaintiff's copyrighted images and have used those images to create their own website and gain membership and advertising revenue by displaying plaintiff's copyrighted photographs on their website. It

is alleged that defendant Digital "enables" the other two defendants to publish plaintiff's copyrighted photographs throughout the Internet. According to the complaint, defendants have infringed and are infringing upon plaintiff's copyrights within Maryland and elsewhere by selling, publishing and/or **[**4]** displaying plaintiff's copyrighted photographs.[1]

II

Applicable Principles of Law

Under Rule 12(b)(2), F.R.Civ.P., a civil action is subject to dismissal if the forum court lacks the requisite personal jurisdiction. In support of its motion to dismiss, defendant Digital argues that it is not subject to either the specific jurisdiction or the general jurisdiction of this Court by virtue of any activities within Maryland.

Personal jurisdiction over a non-resident defendant may be exercised by this Court (1) if authorized by Maryland's Long Arm statute, Md. Code Ann. Cts. & Jud. Proc. § 6-103 and (2) if a defendant has "minimum contacts" in Maryland such that the exercise of personal **[**5]** jurisdiction would not offend traditional notions of fair play and substantial justice. *Atlantech Distrib., Inc. v. Credit General Ins. Co., 30 F. Supp. 2d 534, 536 (D. Md. 1998).* Once a defendant raises a Rule 12(b)(2)

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[1] Since defendant Digital's pending motion will be granted based upon this Court's lack of in personam jurisdiction, it is not necessary to determine whether Digital's conduct as an internet service provider satisfies the safe harbor provisions of the Digital Millennium Copyright Act, *17 U.S.C. § 512.*

defense, the plaintiff bears the burden of proving that the court can exercise personal jurisdiction over the defendant. *Atlantech, 30 F. Supp. 2d at 536.*

A court may exercise either specific or general jurisdiction over a defendant. Specific jurisdiction exists where the claim arises out of the defendant's contacts with the forum state. See *Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984).* General jurisdiction permits a court to subject a non-resident defendant to a suit in the forum wholly unrelated to any contacts in the forum which resulted in the creation of the claim. General jurisdiction exists only when the foreign defendant's in-state activities amount to "continuous and systematic" contact with the state. *Id. at 414-15.*

Applying these principles to the circumstances of this case, this Court concludes that it has neither specific nor general **[**6]** jurisdiction over plaintiff's claim against defendant Digital. Digital does not engage in any continuous and systematic activities **[*706]** within Maryland, and there is no evidence that plaintiff's claim arises out of any contacts which Digital may have with Maryland. Accordingly, Digital's motion to dismiss will be granted.

III

Discussion

Under § 6-103(b)(4) of Maryland's Long Arm statute, a defendant's contacts with Maryland must be extensive, continuous and systematic before the defendant can be held to be subject to general jurisdiction in a Maryland court. *Nichols v. G.D. Searle & Co., 783 F. Supp. 233, 236-*

37 (D. Md. 1992), aff'd *991 F.2d 1195 (4th Cir. 1993)*. For this Court to be empowered to assert personal jurisdiction over Digital, the Court must find that (1) Digital has certain minimum contacts or ties to Maryland such that (2) maintenance of plaintiff's claim would not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*.

While the exercise of specific jurisdiction must also be consistent with considerations of constitutional **[**7]** due process, see *Cape v. von Maur, 932 F. Supp. 124, 127 (D. Md. 1996)* and *Nichols, 783 F. Supp. at 241*, the level of minimum contacts necessary to confer specific jurisdiction is significantly lower than that required for general jurisdiction. See *Atlantech, 30 F. Supp. 2d at 536* (citing *ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 623 (4th Cir. 1997)*. Specific jurisdiction exists when the "contacts related to the cause of action . . . create a 'substantial connection' with the forum state . . . ." *ESAB Group, 126 F.3d at 625* (quoting *McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957))*. The defendant's activities must be purposefully directed at the forum state "in more than a random, fortuitous, or attenuated way." *ESAB Group, 126 F.3d at 625* (citing *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980))*. **[**8]**

As established by the affidavit of Robert Tidwell, Digital's Chief Executive Officer, this Georgia corporation maintains a website that is accessible to the

public through the worldwide web on the Internet at "dscga.com." According to Tidwell, this website contains no means for any person to enter into a contract or otherwise transact business with Digital. Digital conducts no business in and has no offices in Maryland. Tidwell has stated that Digital has not entered into contracts with persons or entities in Maryland and derives no income from clients or business in this State. According to Tidwell, Digital owns no property in Maryland and does not advertise in this State other than indirectly through its website.

The supplemental affidavit of Tidwell along with exhibits submitted by plaintiff indicate that defendant Alternative is the registered owner of the abpefarc.net website, which is the only website that allegedly contained plaintiff's copyrighted material.[2] Alternative owns and controls the servers that host this website and maintains control over the files which remain on these servers, including the files with the infringing images. The record also indicates that Alternative, [**9] as the registered owner of the website, is the entity responsible [*707] for selling membership subscriptions to this website for a fee.

Defendant Digital provides Internet connectivity services to business customers in the southeastern United States, and Digital is not affiliated with Alternative in any manner. Digital merely provides upstream bandwidth service to Alternative as one of its many business customers. Digital does not support the abpefarc.net website and has not received any proceeds

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[2] The supplemental affidavit of Tidwell was submitted by Digital with its reply to plaintiff's opposition to Digital's motion.

from subscriptions to the website. Digital has never had any involvement with the selection and posting of pictures on Alternative's website and has never obtained or published any photographs of which plaintiff claims copyright ownership. According to Tidwell, neither he nor anyone else associated with Digital was even aware of the existence of ALS Scan at the time that the allegedly infringing material **[**10]** was posted. He states that there consequently could not have ever been any intent by him or by anyone else at Digital to harm plaintiff.

In opposing Digital's motion, plaintiff contends that even though defendant Digital is not present in Maryland, its admitted website efforts throughout the United States and in Maryland constitute a "persistent course of conduct in the State" under § 6-103(b)(4). Plaintiff makes three separate arguments in support of this broad contention. First, it is claimed that Digital has purposefully availed itself of the benefits and protections of Maryland law through both dscga.com, its corporate website, and the abpefarc.net website owned by Alternative. Second, plaintiff claims that Digital's contacts with Maryland by way of these websites are substantial enough for Digital to reasonably expect to be haled into a Maryland court. Third, it is contended that this litigation arises out of activities which Digital intentionally directed at Maryland residents through these websites and that Digital therefore had fair warning that it might be subject to jurisdiction in Maryland. In sum, plaintiff argues that as a result of Digital's website activities, the **[**11]** due process clause would not be offended if this Court exercised jurisdiction over the claim asserted by plaintiff in the complaint. This Court must disagree.

In a letter addressed to the Court on April 17, 2001, plaintiff's attorney requested that the Court set a scheduling conference to discuss whether plaintiff might be permitted to [*708] conduct limited discovery on the sole issue of personal jurisdiction. No such request was made in plaintiff's opposition to Digital's pending motion to dismiss. Rather, in that opposition, plaintiff argued that Digital's motion to dismiss should be denied based on the affidavits and exhibits submitted by the parties in support of and in opposition to the motion.

Following its review of the affidavits and exhibits submitted by the parties, the Court has concluded that the facts pertaining to the jurisdictional issue before it have now been fully and fairly developed. Were the Court to permit plaintiff to conduct limited discovery, not only would the parties be undertaking discovery procedures but further briefing would also be necessary, and a decision on the pending motion would be delayed for many months. Defendant Digital is entitled to a prompt [**12] ruling on its motion, and the considerable delay sought by the plaintiff is not appropriate under the circumstances here.[3] Plaintiff's request that it be permitted to conduct limited discovery will therefore be denied.

When a motion challenging personal jurisdiction is decided without an evidentiary hearing, all reasonable inferences must be resolved in the plaintiff's favor. See

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[3] This case has already been delayed because plaintiff has not as yet effected service of process on defendants Wilkins and Alternative Products. This suit was filed on February 16, 2001, and plaintiff should promptly serve these defendants with process to avoid the later dismissal of the action pursuant to Rule 4(m), F.R.Civ.P.

Cape, 932 F. Supp. at 126; (citing *Mylan Laboratories, Inc. v. Akzo, 2 F.3d 56, 60 (4th Cir. 1993).* Applying this principle to the present record which includes affidavits from both the President of plaintiff ALS Scan and the CEO of defendant Digital, the Court is satisfied **[**13]** that any additional information developed by way of discovery would not affect this Court's determination that Digital is not subject to either the specific or the general jurisdiction of this Court under the claim against it alleged in the complaint.

Most cases involving the effect of Internet websites on issues of personal jurisdiction have addressed only the existence of specific jurisdiction. See *Coastal Video Communications Corp. v. The Staywell Corp., 59 F. Supp. 2d 562, 570 n.6 (E.D. Va. 1999)* (citing cases). In this case, plaintiff has not attempted to distinguish between specific and general jurisdiction. Rather, plaintiff has merely argued that Digital's contacts with Maryland are so wide and varied that it should be subject to the personal jurisdiction of this Court. Plaintiff has, however, conceded that this case does not concern the dscga.com website, but rather arises as a result of the abpefarc.net website. To the extent that specific jurisdiction may exist here, it must therefore be based upon the abpefarc.net website, inasmuch as specific jurisdiction arises only from contacts related to the claim or cause of action. See *Helicopteros, 466 U.S. at 414;* **[**14]** *ESAB Group, 126 F.3d at 623.* However, if general jurisdiction exists it may be based upon either the abpefarc.net website or the dscga.com website, because general jurisdiction may arise from contacts of any kind as long as they constitute continuous and systematic activity in the forum state. See *Helicopteros, 466 U.S. at 414; Nichols, 783 F. Supp. at 237.*

Although the law regarding electronic commerce jurisdiction is still evolving, many courts, including this one, have addressed this issue by evaluating Internet websites along a spectrum, ranging from active websites at one end to passive websites at the other. See, e.g., *Virtuality L.L.C. v. Bata Ltd., 138 F. Supp. 2d 677, 2001 WL 337375,* at *6 (D. Md. 2001); *Atlantech, 30 F. Supp. 2d at 537;* see also *Roche v. World Wide Media, Inc., 90 F. Supp. 2d 714, 717 (E.D. Va. 2000); Coastal Video, 59 F. Supp. 2d at 570-72; Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).* Active sites involve situations where the defendant clearly does business over the Internet. *Zippo Mfg., 952 F. Supp. at 1124;* **[**15]** *Virtuality, 2001 WL 337375,* at *6. If the defendant enters into contracts with residents of a foreign jurisdiction which involve the knowing and repeated transmission of files over the Internet to such residents, then personal jurisdiction is proper. Id. A passive website merely makes information available on the Internet without imposing any conditions upon accessibility and without affording Internet users any means of contracting with the defendant. Id.; see also *Atlantech, 30 F. Supp. 2d at 537.* Since a passive site does little more than make information available to interested persons, the mere ability to access a passive website from within the forum is not grounds for the exercise of personal jurisdiction over a non-resident defendant. *Virtuality, 2001 WL 337375,* at *6.

Based upon the record here, including facts pertaining to the scope of defendant Digital's traditional business operations, this Court concludes that Digital's dscga.com **[*709]** website is passive rather than active in nature. Although Digital uses this website for advertising, for providing customer

services and for soliciting employees, there is no indication in **[**16]** the record that the existence of this website has ever directly affected Maryland or its residents. Digital does not sell products nor conduct any other commercial activity for profit over the Internet. Moreover, Digital provides services to customers mainly in the southeastern United States and has never consciously directed any of its activities at Maryland residents nor purposefully availed itself of the benefits and protections of Maryland law. As a result, neither Digital's advertising nor its customer service operations have any substantial connection with this forum. While it may be possible for a Maryland resident to use the dscga.com website to communicate with Digital and obtain information about job opportunities, the record does not indicate that a single Maryland resident has ever done so. Accordingly, this Court concludes that the existence of the dscga.com website does not provide sufficiently "continuous and systematic" contacts between Digital and the State of Maryland for this Court to constitutionally assert general in personam jurisdiction over Digital. See *Atlantech, 30 F. Supp. 2d at 537.*

Relying upon *Inset Systems, Inc. v. Instruction Set, 937 F. Supp. 161 (D. Conn. 1996),* **[**17]** and *Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996),* plaintiff argues that general jurisdiction does exist here merely because the dscga.com website permits Digital to advertise within Maryland and to solicit employees from within Maryland. This argument will be rejected in light of holdings both by this Court and by the Fourth Circuit in *Nichols, 783 F. Supp. 233;* aff'd *991 F.2d 1195.* See also *Millennium Enterprises, Inc. v. Millennium Music LP, 33 F. Supp. 2d 907, 921 (D. Or. 1999)*

(declining to follow both Inset and Maritz). In Nichols, the Fourth Circuit stated that "broad constructions of general jurisdiction should be generally disfavored," *991 F.2d at 1200.* Applying that principle, the Court in Nichols determined that general in personam jurisdiction could not be asserted over a corporate defendant based on activities much more extensive than any undertaken by Digital in Maryland. Id.; see also *Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745, 748* (4th cir. 1971) (holding that the presence within the forum of defendant's advertisements, employees **[**18]** and an agent for service of process does not confer general jurisdiction over the defendant); accord *Coastal Video, 59 F. Supp. 2d at 566* ("It is not sufficient [for jurisdictional purposes] that the product may have been advertised in Virginia, either over the World Wide Web, or through mail order catalogs.") (citing *ESAB Group, 126 F.3d at 625).*

Moreover, the mere placement of a website on the Internet creating the possibility that it might be accessed by an individual in Maryland is not an activity that is sufficiently directed toward the forum state to satisfy the requirements of due process in a case like this one. See *Rannoch, Inc. v. The Rannoch Corp., 52 F. Supp. 2d 681, 685 (E.D. Va. 1999);* see also *Virtuality, 2001 WL 337375,* at *6. To conclude otherwise would subject every defendant with an Internet website to "general personal jurisdiction in every jurisdiction in the country, thereby allowing a plaintiff to sue it for any matter anywhere in the nation. This the constitution does not permit." *Atlantech, 30 F. Supp. 2d at 537;* see also *Roche, 90 F. Supp. 2d at 719.* In sum, **[**19]** the Court is satisfied that the existence of

defendant Digital's dscga.com website in its present form does not confer this Court with general personal jurisdiction over Digital.

[*710] This Court's analysis of jurisdictional issues arising as a result of the abpefarc.net Internet website is somewhat different because that website is not owned and operated by defendant Digital. It is the abpefarc.net website, however, which allegedly contained plaintiff ALS Scan's copyrighted material. The record here indicates that Digital has no control over the content of this website and has never received any proceeds from subscribers to this website. Digital's connection with the abpefarc.net website arises only as a result of services provided by it to defendant Alternative, the entity which is responsible for creating and maintaining this website. Accordingly, the Court concludes that the abpefarc.net website does not provide sufficiently continuous and systematic contacts between Digital and the State of Maryland to support this Court's constitutional exercise of general jurisdiction over Digital.

Plaintiff has also presented several arguments in support of its further contention that specific [**20] personal jurisdiction exists over Digital based upon the abpefarc.net website. There is no merit to any of these arguments. Digital has not, as claimed, purposefully availed itself of the benefits and protections of Maryland's laws by creating obligations owed to Maryland residents by way of the abpefarc.net website. Nor did Digital, on the facts here, ever have a reasonable expectation of being haled into court in Maryland due to any general knowledge that the abpefarc.net website was being accessed in Maryland.

Finally, the Court is satisfied on the record here that Digital did not purposefully direct its activities toward Maryland through the abpefarc.net website, knowing that such conduct would have a harmful effect upon plaintiff ALS Scan within Maryland. Indeed, Digital did not even know of the existence of ALS Scan at the time that the allegedly infringing materials were posted on that website.

Specific personal jurisdiction must be based upon the defendant's substantial connection with the forum by way of contacts related to the cause of action. In this case, the only clear nexus which either ALS Scan or Digital had with Maryland is that plaintiff ALS Scan conducts its business **[**21]** operations here. Such a contact standing alone "is legally insufficient" for the exercise of specific personal jurisdiction. *Cape, 932 F. Supp. at 128* (citing *Sibert v. Flint, 564 F. Supp. 1524, 1529 (D. Md. 1983);* see also *ESAB Group, 126 F.3d at 625-26.*

IV

Conclusion

For all the reasons stated, this Court will grant the motion to dismiss of defendant Digital. Accordingly, it is this 18Th day of May, 2001 by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion to dismiss for lack of personal jurisdiction of defendant Digital Service Consultants, Inc. is hereby granted; and

2. That Digital Service Consultants, Inc. is hereby dismissed as a defendant in this case.

Alexander Harvey, II
Senior United States District Judge

Forwarded message:

From:	Self <Single-user mode>
To:	<george@dscga.com>
Subject:	Re: ADIC#1082 abpeuarc.com - abpefarc.com
Cc:	"APIC-WORLDWIDE" <apic@mindspring.com>, "Robert Lombardo" <MDLawyer@smart.net>, als@clark.net
Reply-to:	webmaster@s2.alsscan.com
Date:	Sun, 22 Oct 2000 11:16:48

Dear Mr. George Beecher,

Your response will now serve as proof of your awareness of this criminal activity that is occuring on your bandwidth. As a bandwidth provider you should talk to your attorney about what your obligations are. We are already aware of them. If these violations continue and you fail to take action now that you are aware, you will be included in any legal proceedings as a willful and contribitory party.

Consider yourself now notified.

Sincerely,
Alex Kirn

----- Original Message -----
From: <george@dscga.com>
To: "Erik Aronesty" <erik@primedata.org>; <hostmaster@dscga.com>; <sales@dscga.com>; <support@bbnplanet.net>; <abuse@bbnplanet.net>; <ops@BBNPLANET.COM>; "APIC-WORLDWIDE" <apic@mindspring.com>
Cc: "SEG" <steve@sweetpartners.com>; "Robert Lombardo" <MDLawyer@smart.net>; "ALSSCAN" <als@clark.net>; "APIC" <apic1@a-w.org>
Sent: Thursday, October 19, 2000 1:11 PM
Subject: Re: ADIC#1082 abpeuarc.com - abpefarc.com

TO ANYONE THIS DOES NOT PERTAIN TO: I apologize for copying you on this message if it is not of any concern to you!

Please be advised that DSC is an Internet Service Provider and as such, we provide Internet Service to businesses. Alternative Products is a customer of ours who pays us for bandwidth, but their system does not belong to us. Their web sites are hosted on their own servers and are not supported in any way by DSC.

The gentleman who sent the message earlier who provided our address and our providers address is incorrect. He states that we are "company that "hosts" (stores on it's network and machines) this site and transmits the information in question" when in fact this is untrue. We DO NOT host this site, we DO NOT store it on our network and we DO NOT store it on our machines.

All we do is provide bandwidth to our customers.

Please refrain from emailing us regarding this matter or from involving us in this matter in any way unless it is a legitimate request for help on a matter that we can assist in. If there is a spam question or some other matter I may assist with and you contact us in a professional manner I will help in any way I possibly can and will be pleased to do so.

Thank you and good day.
George Beecher

From: "Copyright Infringement Division" ALSCopyright@smart.net
To: george@dscga.com, animalguy@EMAIL.COM
Date sent: Thu, 25 Jan 2001 11:13:01+0000
Subject: Electronic Notice of ALS Scan Copyright Infringement
Send reply to: ALSCopyright@smart.net
Copies to: ALSlegal@smart.net, falcon@a-w.org, ALS@clark.net
Priority: normal
TO: George Beecher, Digital Service Consultants, Inc.(ISP of Infringing Site); Administrative Contact, ABPEFARC.NET, (Infringing Site); and Webmaster of ABPEFARC.NET, (Infringing Site):

I, the undersigned, CERTIFY UNDER PENALTY OF PERJURY that I am an agent authorized to act on behalf of the owner of certain intellectual property rights, said owner being named ALS SCAN, INC. ("IP Owner"). I have a good faith belief that the images listed below are not authorized by the above IP Owner, its agent, or the law and therefore infringe the IP Owner's rights according to state, federal, United States, and international law. Please act expeditiously to remove or disable access to the material claimed to be infringing.

Infringing Site:
http://www.abpefarc.net/

Infringed Image:
http://www.abpefarc.net/guests/icons/025.jpg

It appears there are additional images that are ALS SCAN, INC. Federally Copyrighted property that are posted on this site.

Our ALS Scan models can be identified at:

http://www.alsscan.com/modlinf2.html

Our copyright information can be reviewed at:

http://www.alsscan.com/copyrite.html

This cease and desist letter is in compliance with the Digital Millennium Copyright Act ("DMCA") (17 U.S.C. §512(c)(3)).

Be advised that the "ANTI-PIRACY ACT" makes it a federal crime to distribute copyrighted material via the Internet while the "FEDERAL LABELING AND RECORD-KEEPING LAW" (Title 18 USC 2257, 75 CFR 75) makes it a federal crime NOT to maintain, on file, proof of age for every model displayed.

ALS Scan, Inc. is committed to prosecuting offenders of its copyrights.

Truthfully,

/S/:

Robert J. Speidel
Copyright Infringement Division
ALS Scan, Inc.

Please include previous messages in all replies.

****

ALS Scan Inc.

P.O. Box 6541

tel: 410.531.5484
fax: 410.531.6449
web: http://www.alsscan.com

From:	george@dscga.com
To:	ALSLegal@smart.net
Date sent:	Mon, 5 Feb 2001 15:41:46 -0500
Subject:	Re: (Fwd) (Fwd) Re: Electronic Notice of ALS Scan Copyright Infr
Send reply to:	george@dscga.com
Priority:	normal

Well, I appreciate the prompt and more clear response. I do not appreciate the tone with which you delivered it. I am not really clear why you are being so aggressive towards me and my company, but now I understand for the most part what you are upset about. I have initiated the steps to have AltProd cease the posting of your copyrighted materials and look forward to hearing and seeing a response ASAP. I have asked that they contact you directly and copy me. Should I hear from them I will forward the email to you just to be sure you receive it.

Regarding our relationsship: We are simply their upstream provider. That is to say, they pay for X amount of bandwidth and use it as they wish. They have their own servers, in their own control, and our companies have nothing more to do with one another. We can not do anything more than cut their bandwidth if they violate our AUP. In every case of violation they have ever been accused of they have either corrected the problem or proven themselves innocent of whatever accusations were made. Whatever the case, they have always been cooperative. If you haven't heard from them, considering your threatening tone, it doesn't surprise me. Hopefully now that I have contacted them they will respond. Also, to further aid

your quest, any time there is a problem with them that escalates to involve my time, they are charged hourly for it. This tends to encourage a quick resolution as well.

It is my hope that with this clearer picture of the nature of our relationship (or lack of) you will direct all further aggression towards them, and resolving this problem, and begin a polite and less aggressive dialogue with us until the matter is resolved.

If all of the above is not clear, let me sum it up here:

We respond swiftly and clearly (as well as politely) to all AUP violations or legal accusations. We DO NOT support spammers or any other illegal activity on the Internet, and will do everything we can to assist in clearing this matter up as I have stated in every email to you. I would very much appreciate if you would please back down from the aggressive posture you are taking with our company if you wish to receive continued polite assistance.

Thanks!
George Beecher

PS - Whatever "17 USC> §512(i)" is, I am unfamiliar with it....please clarify and inform me as to where I can familiarize myself with whatever this is. Thanks!

FILED
NOV 22 2002
OFFICE OF THE CLERK

No. 02-463

IN THE

Supreme Court of the United States

ALS SCAN, INCORPORATED,

Petitioner,

v.

DIGITAL SERVICE CONSULTANTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Digital Service Consultants, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Factual Background

Petitioner ALS Scan, Inc. ("Petitioner") is a Maryland corporation that creates and sells pornographic photographs that are disseminated over the Internet. Pet. App. at 3.

Respondent Digital Service Consultants, Inc. ("Digital") is an Internet Service Provider ("ISP") that is incorporated under the laws of Georgia and maintains its only place of business in Georgia. Pet. App. at 22. Digital provides access to the Internet to its customers for maintaining websites and other activities over the Internet. Pet. App. at 22. Digital does this by renting portions of its available bandwidth to its customers, but has no input or control over how the bandwidth is used. Pet. App. at 4. Much like the telephone company in the context of oral communications, Digital plays a passive "conduit" role in facilitating the transmission of content over the Internet that is created by others. Digital does not own property, conduct business, or have any offices in the State of Maryland, and it does not derive any income from any clients or business in Maryland. Pet. App. at 4.

One of Digital's customers was Alternative Products, Inc. ("Alternative"). Alternative entered into a contract with Digital, in Georgia, for use of Digital's bandwidth to access the Internet. Alternative used this access to maintain two websites. Pet. App. at 3. Alternative's websites were apparently used by paid subscribers to view the content of the websites, which included adult pornographic photographs. Pet. App. at 3. Digital provided only bandwidth to Alternative (e.g., it provided a transmission function for Alternative's content). Pet. App. at 42. Digital did not

host Alternative's websites, store the content of the websites on its network, or store the content on its equipment. Pet. App. at 42. Digital had no knowledge of, or control over, the content of Alternative's websites. Pet. App. at 4. Petitioner contends that Alternative's websites published allegedly copyrighted materials belonging to Petitioner. Pet. App. at 3.[1]

Unrelated to the Alternative websites, Digital maintains its own generally accessible, informational website on the world wide web on which it describes its services. Pet. App. at 4. This general information website does not propose any Internet-based transactions. No one can buy Digital products or enter into a contractual relationship with Digital directly through its website.

B. Proceedings Below

On February 16, 2001, Petitioner filed suit against Digital and Alternative in the United States District Court for the District of Maryland alleging claims under 17 U.S.C. §§ 101, *et seq.*, commonly known as the Federal Copyright Act of 1976, as amended. More specifically, Petitioner's claims against Digital were brought under the Digital Millennium Copyright Act of 1998 ("DMCA").[2] Prior to filing an answer, Digital filed a motion to dismiss for lack of

---

1. Ultimately, Digital terminated its relationship with Alternative and no longer provides Internet access to Alternative.

2. Petitioner's complaint sought monetary and injunctive relief against Digital. Since Digital is no longer providing Internet access to Alternative, Petitioner's request for injunctive relief against Digital is moot. The only possible claim for relief remaining against Digital is Petitioner's prayer for monetary damages.

personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). The District Court granted that motion and dismissed the complaint against Digital. The District Court held that it had neither specific nor general jurisdiction over Digital because Digital did not engage in any continuous or systematic contacts with Maryland and there was no evidence that Petitioner's claim arose out of any contacts that Digital may have had with Maryland. The District Court found that the only contact either Petitioner or Digital had with Maryland was that Petitioner (the plaintiff below) conducted its business there, which, standing alone, was legally insufficient for the exercise of personal jurisdiction in Maryland. Pet. App. at 34.

On June 14, 2001, Petitioner filed its Interlocutory Notice of Appeal. On June 19, 2001, the District Court certified its Order for immediate appeal to the United States Court of Appeals for the Fourth Circuit. On June 14, 2002, the Fourth Circuit affirmed the District Court's opinion. The Fourth Circuit found that Digital lacked sufficient contacts with Maryland to support the exercise of personal jurisdiction in Maryland under either Maryland's long-arm statute or the Due Process Clause. The court of appeals noted that although electronic signals from Digital's facility were received in Maryland, Digital's activities of providing bandwidth to Alternative and publishing its own website, which was unrelated to the infringement claim, were merely passive; Digital did not direct its electronic activity specifically at any target in Maryland and did not manifest an intent to engage in a business or some other interaction in Maryland.

On September 12, 2002, Petitioner filed a timely Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit seeking this Court's review.

REASONS FOR DENYING THE PETITION

This case does not present any clear or important question of law worthy of this Court's consideration on plenary review. Both the district court and a unanimous court of appeals held that, under the unique facts of this case, personal jurisdiction was lacking. That ruling is undoubtedly correct, and fully consistent with this Court's personal jurisdiction cases.

Under traditional due process analysis, Digital cannot be said to have purposefully availed itself of a Maryland forum for any purpose, nor could it expect to subject itself to Maryland jurisdiction by providing Internet transmission services to a Georgia entity in Georgia. Under well-established Due Process principles for evaluating the exercise of both specific and general personal jurisdiction, Digital's contacts with Maryland are insufficient to support the exercise of personal jurisdiction. While the Internet may be a relatively new technology, the Fourth Circuit faithfully applied this Court's minimum contacts precedents to the unique facts present here.

Petitioner's attempt to cast the Fourth Circuit decision as addressing a novel issue of law or as conflicting with the decisions of this Court or those of other circuits is unfounded. First, the ruling below relied extensively on the very precedents from this Court that Petitioner claims were ignored by the Fourth Circuit. Whether or not the framework of *Zippo v. Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) is applied to the facts of this case, the result is the same, personal jurisdiction is lacking as a matter of law. Second, there is no conflict among the circuits. Both the Tenth Circuit and the District of Columbia Circuit have cited *Zippo* with approval and there

is no indication that either court would decide the personal jurisdiction issue on the facts of this case any differently from the Fourth Circuit. The cases relied upon by Petitioner to allege a conflict are readily distinguishable and do not even support a conflict in legal approach let alone the kind of intolerable conflict justifying this Court's intervention.

Finally, the passage by Congress of the Digital Millennium Copyright Act of 1998 provides immunity from suit to most ISPs for copyright violations if the ISPs are mere passive conduits. In this case, Digital was a mere passive conduit. As a result, the facts at issue in this case will not arise very often. The statutory immunity will render questions of personal jurisdiction in the context of copyright actions for passive conduit activity moot. Therefore, a review of this case will not be helpful to the development of the law as Petitioner suggests because the case does not address an "important federal question."

Because the Court's intervention is clearly not called for at this time and because this case constitutes a poor vehicle for the announcement of any general principles of law in the area of personal jurisdiction, the petition for a writ of certiorari should be denied.

I.

THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S MINIMUM CONTACTS JURISPRUDENCE TO THE UNIQUE FACTS OF THIS CASE

This case does not present any novel question of law for this Court to decide. Rather, on the unique facts of *this* case both the district court and a unanimous Fourth Circuit held

that personal jurisdiction was lacking. In so holding, the lower courts faithfully applied this Court's minimum contacts precedents to the undisputed facts in this case. Because the lower courts correctly concluded that Digital did not "purposefully avail" itself of the privilege of conducting business activities in Maryland, there is no justification for this Court's review.

A. The Personal Jurisdiction Standard Applied by the Fourth Circuit is Consistent with Due Process

The question of whether a court has personal jurisdiction over a defendant is founded in the Constitutional guarantee of Due Process. This Court has established a two-pronged test for determining whether the exercise of personal jurisdiction comports with Due Process. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The first prong requires that the defendant have certain "minimum contacts" with the forum. *Id.* at 317. The test for whether sufficient "minimum contacts" exist depends on whether the court seeks to exercise general or specific jurisdiction.[3] But both tests require the weighing of the specific facts before the court to determine the reasonableness of exercising jurisdiction. *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978). The second prong, which has not been raised as an issue in this petition, is whether the exercise of jurisdiction

3. Petitioner's Question Presented does not specify whether it refers to general or specific jurisdiction. Pet. at i. The fact that the Question Presented is ambiguous makes it a poor candidate for this Court's review. The Fourth Circuit confronted the same uncertainty over which form of jurisdiction was being asserted by Petitioner and held that Digital's contacts with the forum were insufficient to exercise either general or specific jurisdiction over Digital. Pet. App. at 16-17.

comports with "fair play and substantial justice." *International Shoe*, 326 U.S. at 316. The fact-bound nature of the personal jurisdiction inquiry, standing alone, makes this an inappropriate case for this Court to review.

To trigger *specific* jurisdiction, a defendant's "minimum contacts" with the forum must satisfy three criteria. First, the contacts must be related to the plaintiff's cause of action or have given rise to it. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985). Second, the contacts must involve an act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Third, the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Personal jurisdiction is properly exercised where the defendant's contacts with the forum proximately result from actions by the defendant *itself* that create a substantial connection with the forum. *Burger King*, 471 U.S. at 475 (*quoting McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

General jurisdiction is necessary in a suit not arising out of or related to the defendant's contacts with the forum. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, n.9 (1984). In general jurisdiction cases, the "minimum contacts" prong is met if the defendant has "continuous and systematic" contacts with the forum state. *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952) (permitting general jurisdiction where defendant's contacts with the forum were "continuous and systematic"). "[T]he threshold minimum contacts required to confer

general jurisdiction is a significantly higher standard than for specific jurisdiction." *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997).

This Court has previously addressed the effect of technological advances on personal jurisdiction. In *Hanson v. Denckla*, this Court held that while advances in communications and transportation have made it less burdensome for nonresidents to defend suits in foreign forums, this trend does not extinguish all restrictions on personal jurisdiction because it does not affect the Due Process considerations related to a court's assertion of power over defendants. 357 U.S. at 250-51. The minimum contacts analysis, as it relates to the court's power over defendants is, therefore, largely unaffected by changes in technology.

B. The Fourth Circuit's Opinion Does Not Conflict With Any Decision of this Court

Despite Petitioner's contention, there is no conflict between the Fourth Circuit's opinion and this Court's personal jurisdiction jurisprudence. This Court has historically declined to find that a conflict exists unless there is a "real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." *Robert L. Stern, et al., Supreme Court Practice* 167 (7th ed. 1993). There is no "real or 'intolerable'" conflict between the decision of the Fourth Circuit and prior decisions of this Court.

A review of the Fourth Circuit's decision reveals that the court set forth the standard for personal jurisdiction articulated by this Court, and then applied it to the unique facts of this case. The Fourth Circuit began its analysis by

noting that this Court held in *Hanson v. Denkla* that changes in technology making interstate travel and commerce faster and easier do not eliminate all restrictions on the exercise of personal jurisdiction by courts. Pet. App. at 8-9. Based on *Hanson*, the Fourth Circuit rejected the notion that simple electronic transmissions into a state alone are sufficient minimum contacts for purposes of personal jurisdiction. Pet. App. at 8. To hold otherwise, as Petitioner submits, would eviscerate the requirement of minimum contacts whenever any modern means of electronic communication (*e.g.*, telephone, Internet) is used by a defendant for any purpose.

In analyzing the facts of this case, the Fourth Circuit adopted and adapted a model developed in *Zippo* for determining when sufficient minimum contacts exist in the Internet context. Pet. App. at 14. The *Zippo* model can be described as a sliding scale based on the extent to which a defendant's electronic contacts interact with the forum. The Fourth Circuit analogized the model developed in *Zippo* to a similar application of the personal jurisdiction test made by this Court in *Calder v. Jones*, 465 U.S. 783 (1984). Pet. App. at 15.[4]

After adopting and adapting the *Zippo* model, the Fourth Circuit set forth a three-part test, which is entirely consistent

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4. *Calder* involved defendants who wrote and edited a libelous story in Florida for a publication circulated in California about a California resident. 465 U.S. 783. This Court held in *Calder* that personal jurisdiction over the defendants was proper because the defendants directed their tortious conduct at the plaintiff in California and the defendants knew at the time the tort was committed that the injury would be felt by the plaintiff in the forum. *Id.* The key fact in *Calder*, which is lacking here, is the conscious direction of activity by the defendant toward the forum at issue.

with *Calder* and this Court's other minimum contacts precedents. Pet. App. at 14. The test states that a court may exercise judicial power over a person outside of the State when that person "(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts." Pet. App. at 14. This test follows the inquiry made by this Court in *Calder* because it asks whether the defendant purposefully directed its conduct toward the forum state. As such, the Fourth Circuit did not adopt a "new test" for minimum contacts—it merely adapted well-established concepts from this Court's minimum contacts jurisprudence to the Internet context.

On the particular facts of this case, the Fourth Circuit held that because Digital's conduct relative to its electronic contacts with Maryland was passive, it did not purposefully direct its activity toward the forum. Pet. App. at 15. Digital had no control over Alternative's content and did not direct that content to any particular forum. The finding of a lack of specific personal jurisdiction in this context is fully consistent with (and indeed dictated by) this Court's minimum contacts precedents. The Fourth Circuit would have been obligated to reach the same result regardless of its reference to the *Zippo* model, for this Court's decisions such as those in *Calder* and *Burger King* draw the same distinction between passive and active contacts outside the Internet setting.

II.

THE *ZIPPO* TEST ADOPTED AND ADAPTED BY THE FOURTH CIRCUIT IS NOT A NEW TEST FOR PERSONAL JURISDICTION

The *Zippo* court did not set forth a "new test" for exercising personal jurisdiction over a defendant as alleged by Petitioner. Petitioner attempts to portray the *Zippo* court as a renegade court that ignored this Court's precedents. The *Zippo* court, however, simply applied this Court's precedents to a modern fact pattern. *Zippo* was a trademark infringement case involving a defendant online news service that conducted much of its business over the Internet. 952 F. Supp. 1119. The *Zippo* court, therefore, addressed the propriety of personal jurisdiction when a defendant's contacts with the forum are electronic contacts rather than physical ones. Those facts were analyzed under the traditional concept that "when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper." *Zippo*, 952 F. Supp. at 1124 (*citing Burger King*, 471 U.S. at 475). The result was a model suggesting that when a defendant uses a website on the Internet to conduct its business, it is how the website is used that determines the relevant contacts with the forum. *See Zippo*, 952 F. Supp. at 1124. In other words, if the website interacts with persons in the forum state (such as offering to complete a transaction through the Internet contact), those contacts may be enough to show that the defendant purposefully availed itself of the forum. In essence, they are no different than a "bricks and mortar" retail presence. But when the Internet activity is entirely passive, such as merely providing transmission of other's content without control over form or destination, or

running an "informational website" that does not itself offer to transact any business, this is not enough contact for personal jurisdiction. *See id.*

The principles recognized in *Zippo* are fully consistent with this Court's requirements of "purposeful availment" and the notion that the defendant should be aware its contacts could lead to personal jurisdiction. These tests are not met in the case of purely passive Internet activity or presence. Thousands of interstate and international businesses maintain informational websites that can be accessed in every State and territory in the Union (and, in fact, all over the world). Where those websites are not used to transact business, their owners have not subjected themselves to nationwide personal jurisdiction.

The Fourth Circuit's holding here is also consistent with this Court's holding that personal jurisdiction cannot be based on the unilateral activity of another party but, rather, it must be based on the intentional activity of the defendant. *See Hanson*, 357 U.S. at 253. In this case, it is Alternative that transacted business through its website in various states—Digital's transmission services did not offer a transaction to anyone. Therefore, the *Zippo* court did not announce a new test under Due Process for personal jurisdiction; it merely applied a modern factual scenario to existing Supreme Court jurisprudence.

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE JURISDICTIONAL ISSUE PRESENTED BY THIS CASE

Petitioner argues that this Court should review the Fourth Circuit's opinion because there is a conflict between the circuit courts of appeals as to the application of the *Zippo* model. Pet. at 24. However, no circuit court of appeals' decisions are in conflict with the Fourth Circuit's decision. As stated above, this Court historically declines to find that a conflict exists unless there is a "real or 'intolerable' conflict on the same matter of law or fact." *Stern*, *supra* at 167. Petitioner attempts to raise the specter of a conflict by stating that the Tenth and District of Columbia Circuits apply the traditional personal jurisdiction analysis while the Fourth Circuit chose to apply a "new test." Pet. at 24. Petitioner's argument fails because the Tenth Circuit and the District of Columbia Circuit have both cited *Zippo* with approval and followed its reasoning, including in the Tenth Circuit case cited by Petitioner.

A. The Tenth Circuit Approves of the *Zippo* Model.

The Tenth Circuit case Petitioner cites in support of its argument that a conflict exists among the courts of appeals actually approves of the result reached in *Zippo*. *See Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000). It is, therefore, difficult to understand Petitioner's proffer that the Tenth Circuit in *Intercon* chose to apply the traditional due process analysis in an Internet tort action while *Zippo*, and thus, the Fourth Circuit, did not. In holding that the defendant's contacts with the forum were

substantial enough to make the exercise of jurisdiction reasonable, the Tenth Circuit cited *Zippo* as an "analogous situation." *See Intercon*, 205 F.3d at 1248. *Intercon* involved a tort claim against a defendant who accessed the plaintiff's server without permission. The *Intercon* court held that because the electronic contacts were directed at the forum and actually affected the plaintiff's property in the forum, such contacts were sufficient minimum contacts for personal jurisdiction purposes. *Id.* While the court did not expressly address or adopt the *Zippo* sliding scale model, it applied the same analysis as the Fourth Circuit and the *Zippo* court in addressing minimum contacts in an Internet case. *Id.* It noted the distinction made in *Zippo* between passive website cases and those cases where defendants actually enter into contracts with residents of the forum that involve the repeated transmission of information over the Internet. *Id. Intercon* thus represents the application of the same principles applied by the Fourth Circuit to a different set of facts with a different result—not a conflict that suggests the Tenth Circuit would come to a different result under the facts of this case.

Further proof of the Tenth Circuit's approval of the Zippo analysis is found in *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999). In that case, the Tenth Circuit adopted the *Zippo* sliding scale reasoning in deciding that it did not have general jurisdiction over the defendant. *Soma* involved a suit by an account holder of the defendant bank for breach of contract and negligence after the bank allegedly disbursed funds based upon an unauthorized signature. The *Soma* court held, inter alia, that the defendant's maintenance of an informational website on the world wide web that is accessible from the forum state did not create the kind of minimum contacts sufficient for exercising general

personal jurisdiction. In so holding, the *Soma* court quoted a District Court of Utah case that adopted *Zippo*'s model. Therefore, Petitioner's argument that a conflict exists between the Tenth Circuit and the Fourth Circuit is unfounded.

B. The District of Columbia Circuit Approves of the *Zippo* Analysis.

The District of Columbia Circuit also approves of the analysis used in Zippo and adopted by the Fourth Circuit. The case cited by Petitioner as conflicting with the Fourth Circuit is *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000). Any purported rejection of the *Zippo* standard in this opinion, however, is dicta because the court remanded the matter back to the district court so that the plaintiff could conduct discovery on the issue of personal jurisdiction. *See GTE*, 199 F.3d at 1352. Also, despite Petitioner's contention that the District of Columbia Circuit "specifically rejects *Zippo*" in *GTE*, a fair reading of the opinion illustrates that it agrees with the *Zippo* model.

In *GTE*, the District of Columbia Circuit rejected GTE's argument that accessability of the defendant's website in the forum establishes minimum contacts because, under that view, the use of a website would subject its owner to jurisdiction in every court in the country. 199 F.3d at 1350. In other words, the court described a "passive" website under the *Zippo* model and agreed that such activities are not sufficient for personal jurisdiction. *Id.* The court also stated that personal jurisdiction cannot be based solely on the "ability of District residents to access the defendants' websites, for this does not by itself show any persistent course

of conduct by the defendants in the District." *GTE*, 199 F.3d at 1349. This is exactly the holding in *Zippo* and of the Fourth Circuit in this case.

In a case decided this summer, the District of Columbia Circuit also quoted the *Zippo* court's definition of the type of Internet activity at the end of the sliding scale where personal jurisdiction exists. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002). The *Gorman* court went on to say that an examination of the frequency and volume of the defendant's transactions with the District of Columbia would determine whether it is actually "doing business" in the forum. *Id.* This inquiry by the District of Columbia Circuit asks where on the *Zippo* sliding scale the defendant's contacts reside, demonstrating its approval of *Zippo*. This is the same inquiry employed by the Fourth Circuit in this case. Therefore, despite Petitioner's assertions, there exists no conflict between the circuits on the issue presented in this case.

The lack of any real conflict between circuits is evidence that percolation of how minimum contacts should be considered in the context of the Internet has not occurred. *See Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.") Until there is a real conflict among the circuits on this issue, this Court should decline to consider it.

IV.

THIS CASE DOES NOT RAISE ANY IMPORTANT ISSUES OF FEDERAL LAW WORTHY OF THIS COURT'S REVIEW

In addition, the Court should deny this petition because it does not present an important issue of federal law that is likely to recur. In most cases where an ISP acts as a passive conduit for the content of its customers, section 512 of the DMCA will provide immunity from suit for copyright violations. The DMCA was enacted to, *inter alia*, "provide immunity to [Internet] service providers from copyright infringement liability for 'passive,' 'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider." *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001).

The DMCA, therefore, protects ISPs who meet certain safe harbor requirements from liability for all monetary relief for direct, vicarious *and* contributory infringement. *See Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001). In this case, Digital was a passive conduit and is protected from liability by the DMCA. Therefore, since cases factually similar to the one presented in this Petition will be rare in the future, Petitioner's Question Presented does not present an "important federal question" that is worthy of this Court's limited resources on plenary review.

CONCLUSION

For all of the foregoing reasons, Digital respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 02-463

In The
Supreme Court of the United States

ALS SCAN, INCORPORATED,

Petitioner,

v.

DIGITAL SERVICE CONSULTANTS, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Brief in Opposition

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REPLY BRIEF OF PETITIONER

The Brief in Opposition to *certiorari* wrongly argues that this case does not present any clear or important question of law worthy of the Court's consideration and, therefore, this Court's intervention is clearly not called for at this time. (Brief Opp. 4, 5). Furthermore, the brief contends that the issue presented, how minimum contacts should be considered in the context of the Internet, should be allowed to "percolate" in the lower courts. (Brief Opp. 16).

Regrettably, this issue has been percolating for at least six years,[1] leaving confusion in its wake and no consensus in sight.[2] As the "Report on Global Jurisdiction Issues Created by the Internet" points out; "the lack of clarity in lower court opinions in the [United States] simply reflects the lack of clarity in a doctrine that is highly fact specific."[3] Even the Fourth Circuit seemed to hint that "the due process concepts of personal jurisdiction" need to be rearticulated by this Court "in light of technology advances." (Pet. App. 12)

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[1] *See Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996)(the first reported decision on the issue).

[2] *See e.g., Yahoo! Inc v La Ligue Contre Le Racisme Et L'Antisemitisme* 145 F. Supp 2d 1168 (N.D. Cal 2001) and 169 F Supp 2d 1181 (N.D. Cal 2001).

[3] Am. Bar Ass'n Global Cyberspace Jurisdiction Project, Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet ("Global Cyberspace Jurisdiction Project") at p. 51-52 (July 10, 2000), at http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf

It has been fifteen years since this Court's last personal jurisdictional foray in which it found "that the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987). There is no question that an Internet Service Provider specifically publishes and/or "places" information on the Internet and, as the Australian High Court recently reasoned,[4] online publishers know what the Internet is capable of when they publish.[5]

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[4] On December 10, 2002, the Australian High Court handed down a well-reasoned opinion on jurisdiction in *Dow Jones & Co. Inc. v. Gutnick*, 2002 AUST HIGHCT LEXIS 44 – a claim for defamation for online publication. The court held:

> In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a Web browser to pull the material from the Web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

Id. at 34. *Cf. United States v. Thomas*, 74 F.3d 701, 707 (1996).

[5] However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.

Dow Jones & Co. Inc. at 30-31.

Three days after Australia's highest court ruled that Dow Jones could be sued for defamation in Australia over articles from Barron's magazine that were posted on the Internet in the United States, the Fourth Circuit, relying on the standard articulated in this case, ruled that Virginia lacked jurisdiction to hear a prison warden's claim of libel, where articles published by two Connecticut newspapers on their Web sites, implied that the warden was "a racist who advocates racism." *Young v. New Haven Advocate*, 2002 U.S. App. LEXIS 25535. As these two recent cases highlight, this Court's intervention is clearly called for at this time.

In this case, not only did Respondent Digital Service Consultants, Inc. ("Digital") know that it was publishing throughout the world, it specifically knew that it was publishing copyrighted photographs belonging to a Maryland corporation and, thereby, causing harm in Maryland. Additionally, it steadfastly refused to respond to repeated demands that it stop the publication of the photographs; providing the requisite "something more" that was lacking in *Asahi*. (Pet. App. 36-43).

The *Zippo* Model.

The brief opposing *certiorari* argues that "the Tenth Circuit and the District of Columbia Circuit have both cited *Zippo*[6] with approval and followed its reasoning." (Brief Opp. 13). In fact, while no other Circuit Court (except the Fourth Circuit) has expressly adopted the *Zippo* model, most commentators have specifically

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[6] *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D. Pa 1997).

criticized it. Because of *Zippo*, courts have become "clearly . . . convinced that the nature of a defendant's web site is relevant to the jurisdictional issue, but a failure to articulate why it is relevant makes it difficult to determine where the jurisdictional line should be drawn in cases that fall between Zippo's two extremes."[7] Interestingly, "no other country has focused on the degree of a site's interactivity in assessing jurisdiction."[8]

The Digital Millennium Copyright Act of 1998 ("DMCA").

Inexplicably, the Brief in Opposition claims that the DMCA effectively renders this issue moot and, therefore, a review by this Court "will not be helpful to the development of the law." (Brief Opp. 5). Equally bizarre is the assertion that "Petitioner's claims against Digital were brought under the [DMCA]." (Brief Opp 2). This is simply untrue and there is no evidence in the record to support such a statement. There has also been no evidence introduced that Digital has met any "safe harbor requirements" under the DMCA. (Brief Opp. 17). Rather, it is clear that Digital had knowledge of the copyright infringement (Pet. App. 36-43), but took no action to terminate "its relationship with Alternative" and/or terminate "Internet access to Alternative." (Brief Opp. 2, fn. 1). Therefore, Section IV of Digital's Brief in Opposition is unsupported, irrelevant, and, as such, need not be considered by the Court.

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7 Global Cyberspace Jurisdiction Project at p. 57.

8 *Id.* at 58.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to afford all parties the opportunity to fully and adequately brief this timely and significant issue.

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Dated: December 23, 2002